IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 5885 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

THAKORBHAI HARIBHAI VANJARA DIED,THRO'HIS HEIRS
Versus
ISHWARLAL HARIBHAI VANJARA

Appearance:
1. First Appeal No. 5885 of 1999
MR RS SANJANWALA for Petitioner No. 1-1/2
MR KS JHAVERI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 11/02/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE KSHITIJ R.VYAS)

1. This appeal under section 96 of the Civil Procedure Code is directed against the judgment and decree dated 30.6.1999 passed by the learned Civil Judge, Senior Division, Valsad in Special Civil Suit No. 155 of 1994 by which the suit filed by the respondent plaintiff is allowed in toto. The learned Trial Judge passed the following order:

> "The suit of the plaintiff is decreed (allowed) and it is hereby held and decreed that the plaintiff is the owner of half portion of the properties bearing survey nos. 82/3, 86/1, 861/2, 862/3 and 863/3 admeasuring in all 36 Acres 21 Gunthas of Mouje Khatalwada, Taluka Umargam, District: Valsad."

2. The case of the plaintiff is that the plaintiff and the defendant are brothers. That the suit lands were allotted to the defendant under section 32G of the Bombay Tenancy Act (hereinafter referred to as 'the Act') and the Certificate of Purchase was also issued in the name of the defendant under section 32M of the Act and that the plaintiff was minor at the time of purchase of land; that afterwards the plaintiff and the defendant decided to partition the lands; the plaintiff was given half of the lands on the northern side and the defendant remained in possession and occupation of the land on southern side. It is the case of the plaintiff that the father of the plaintiff was tenant and member of the joint family.

3. The suit was contested by the appellants defendants by filing written statement Ex. 9 inter alia contending that the suit is barred by the period of limitation; as the plaintiff has not prayed for any other consequential relief, the suit for declaration only is not maintainable. It was also contended that the disputed lands are restricted tenure lands under section 43 of the Act and the said lands have been acquired/ obtained under the order passed by the Tenancy Court and against the said order, till this date, the plaintiff has not filed any appeal or revision; orders passed by the Tenancy Court are final orders; further in view of section 85 of the Tenancy Act, Court will have no jurisdiction overriding such orders. The defendants denied the contention that the possession of the suit properties was joint possession. According to the defendants, the properties are absolutely/ fully in possession and occupation of the defendants. In substance, the defendants disputed the claim of the

plaintiff and prayed for dismissal of the suit with costs.

4. The learned Trial Judge framed issues at Ex. 11 and after appreciating oral as well as documentary evidence on record, allowed the suit in toto and passed decree in favour of the respondent. Hence this appeal.

5. We have heard Mr.SH Sanjanwala, learned Senior Counsel for the appellant and Mr. KS Jhaveri, learned Counsel for the respondent. We have also gone through the evidence on record.

6. Learned Senior Counsel Mr. Sanjanwala broadly raised the following contentions:

(i) The suit is barred by limitation;

(ii) The very contract which is pleaded by the respondent is contrary to public policy and hit by section 23 of the Contract Act and, therefore, void;

(iii) The appellant has become the owner by virtue of section 32G of the Tenancy Act. In view of the Sale Certificate issued under section 32M, the lands could not have been transferred under section 43 of the Tenancy Act.

(iv) Once the appellant paid purchase price, the lands cannot become joint family property. In any case, there is no evidence on record with respect to the property being a joint family property.

Mr.Jhaveri, learned Counsel for the respondent, on the other hand, while supporting the judgment of the trial court in toto, submitted that the partition of lands between the parties was arrived at by way of an understanding and, therefore, the same is permissible subject to the approval of Collector under section 43 of the Act. He further submitted that the partition of lands was effected between the parties at their own volition and the same has been acted upon and, therefore, the appellants are estopped from challenging the same.

7. In the present case, the respondent has deposed vide Ex. 38. According to his oral testimony, the original owner of the suit properties was one Krushnaji Kondo Chapekar. The said lands were in possession/ occupation of his father Haribhai as a tenant on behalf of joint family. He expired on 26.2.1957. He has clearly deposed that his father being the tenant of the

suit properties on behalf of joint family, entries to that effect were recorded in the Government record. After the death of his father, the appellant being his elder brother, his name was entered qua tenancy lands as the respondent was minor. He has further deposed that the name of the appellant was recorded/ entered as Karta/ Manager of the joint family. Both the brothers had taken out and partitioned one half of the share each of the suit properties. However, since these lands cannot be partitioned under the law, the same were not partitioned in accordance with law. The lands situated towards northern side came to the share of the respondent and the lands situated towards southern side came to the share of his elder brother. The possession of his father of these lands was in the capacity of tenant of the owner on behalf of the joint family. The Sale (Purchase) Certificate in respect of the suit lands was issued in the name of his elder brother. These lands are in all admeasuring about 36 Acres 21 Gunthas wherein the plaintiff and the defendant are having equal share. He has also deposed that in respect of these lands, Ceiling Form was filled in in the year 1970 wherein half share was admitted. In the Ceiling case, the appellant had filed affidavit and also given his statement wherein also half share of the respondent was admitted. According to him, he is growing grass and rice under the ownership rights and earning therefrom. As the appellant administered threats to him in respect of the lands in his possession situated towards northern side, on 17.9.1994, he filed the present suit.

8. The documentary evidence produced on the record of the case also supports the oral testimony of the respondent. On 10.1.1976, below Ex. 51, the appellant Thakorbhai made a statement before Talati-cum- Mantri to the effect that his father Haribhai was cultivating the suit property as a tenant. After the death of his father, he and his brother Ishwarbhai (respondent) were independently cultivating. However, the lands had not been entered into the revenue record and, therefore, the lands be entered into the revenue records as per the details given by him. Similar statement is made by the respondent Ishwarbhai. In his statement also, he has given details about the lands which are under his cultivation. The necessary panchanama to that effect was made vide Ex. 52 on the basis of the statements given by the parties. Ex. 53 is the Revenue Entry no.1912 dated 5.8.1957 which gives details as to Krishnaji Chapekar being the owner and Haribhai being the tenant of the lands in question. Ex. 54, 55,56, 58, 59,60, 62, 63 and 64 are the rent receipts showing payment of revenue by

the parties.

9. On the basis of the statements given by the parties vide Ex.51, necessary entries were made in the revenue record. It appears that the respondent, vide his application dated 22.10.1982 made to Deputy Collector, Bulsar, applied for inclusion of his name as a co-tenant of the lands in question. The Deputy Collector, after hearing the parties, allowed the said application against which Revision Application being RTS Case No. 40 of 1983 was filed by the present appellant before Collector, Bulsar. The same was also allowed by the Collector, Bulsar vide order dated 29.11.1983 vide Ex. 46. The Collector also recorded in the order that originally the father of the parties i.e. Haribhai was the tenant of the lands in question and as the respondent was minor in the year 1957, the name of the appellant was entered as a tenant of the lands on the death of Haribhai and accordingly the appellant was declared tenant of the suit lands. True, the orders of the Deputy Collector as well as Collector were set aside by the Revenue Secretary on 22.9.1989 vide Ex. 87. However, the fact remains that the appellant admitted vide Ex. 51 that he was cultivating the lands as tenant of the joint family. The Revenue Secretary simply set aside the entry in favour of the parties in revenue record. The said fact will not nullify the case put forth by the respondent supported by the admission of appellant vide Ex. 51 and panchanama Ex. 52, the entry showing the name of the father of parties as tenant of the lands in question below Ex.53. In our opinion, the aforesaid documentary evidence on record clearly supports the oral version of the respondent plaintiff.

10. As against this, the appellant has neither entered the witness box nor examined any witness on his behalf. Thus, there is no rebuttal evidence against the specific case of the respondent, namely that the appellant was cultivating lands as tenant for and on behalf of joint family. Admittedly, the respondent was minor in the year 1957 when the original tenant, the father of the parties - Haribhai died. Therefore, the appellant being the major son, succeeded his father as tenant. Therefore, the claim put forth by the appellant, namely that he was the exclusive owner in possession of the entire lands is without any substance.

11. It is the contentioin of the appellant that the suit is barred by limitation under section 3 of the Limitation Act. In the submission of learned Counsel for the appellant, cause of action arose for the respondent

plaintiff to file the suit when Special Secretary dismissed revision application on 22.9.1989. By inviting our attention to Article 58 of the Limitation Act, it is submitted that three years period expired in the year 1992 and the suit was filed in 1994 which was clearly time barred. Our attention is invited to the decision rendered by the Supreme Court in the case of Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and ors., AIR 1964 SC 1336. The Apex Court, in the said decision, held that the trial court had jurisdiction to determine whether there was sufficient cause for the plaintiff for not making the application for setting aside the abatement in time and if so satisfied, to admit it, and the high Court fell in error in interfering with that finding of fact.

There cannot be any dispute with regard to the principle laid down in the said decision. However, considering the facts of the present case, in our opinion, the said decision is not applicable for the simple reason that in the instant case, the suit is within time. The respondent challenged the decision of Special Secretary by filing a petition being Special Civil Application No. 77 of 1990. This Court rejected the said petition on 22.11.1991 by observing that the petition pertained to mutation entries in the revenue record and, therefore, civil suit will be the proper remedy. Pursuant to the said, the present suit was filed. Taking into consideration the said fact, the respondent has stated that the cause of action arose when this Court rejected the petition. In that view of the matter, we see no merit in the submission that the suit is time barred.

12. The contention is advanced on behalf of the appellant, namely that the contract which is pleaded by the respondent is contrary to section 23 of the Contract Act as well as section 43 of the Bombay Tenancy Act. Our attention is invited to the averments made in the plaint wherein it is stated that the plaintiff was minor at the time of death of the father of plaintiff and defendant and as the suit properties were purchased under the Tenancy Act, partition under law was not permissible and, therefore, the plaintiff and the defendant, as per their convenience, partitioned the same by dividing equally. In the submission of learned Counsel for the appellant, above admission of the plaintiff is contrary to the provisions of law and is against the public policy and, therefore, the transaction is void ab initio.

Our attention is invited to the Full Bench

decision of Allahabad High Court in the case of Nutan Kumar and ors. Vs. 2nd Addl. District Judge, Banda and ors., AIR 1994 Allahabad 298. That was a case wherein an agreement of lease between the landlord and the tenant for letting and occupation of a building in contravention of the provisions of the U.P.Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 was entered. The Full Bench of Allahabad High Court, after considering the provisions of law and the transaction, held that such a transaction was void and the agreement was unenforceable in law and no decree for ejectment of the tenant could be passed in favour of the landlord on the basis thereof.

While agreeing with the principle laid down therein, in our opinion, this decision will not be of any help to the appellant. In the present case, we have to consider the facts and circumstances of the case. As observed above, the father of the parties was the original tenant of the suit lands and upon his death, the respondent being minor, the appellant had succeeded as a tenant and purchased the lands not forhimself, but for the joint family which has been acted upon by an understanding between them by equally dividing the lands. Thus, the suit properties, though purchased by the appellant as a tenant, for all practical purposes, were joint family properties. Therefore, the properties as per the understanding arrived at between the parties,were divided and it cannot be contended that the partition was contrary to the provisions oflaw or against public policy. In view of the fact that under section 43 of the Act, partition is permissible after the approval of the Collector, the alleged transaction between the parties cannot be construed as void and uneforceable. We, therefore, find no merit in this contention and the same is rejected.

13. In view of the above discussion, we see no merit in this appeal. Suffice it to say that we are in total agreement with the reasonings and the ultimate conclusion reached by the learned Trial Judge. There being no substance in this appeal, it is dismissed with no order as to costs. Interim relief, if any, stands vacated.

The amount of Rs. 6.35 lacs deposited by the appellant in this Court, of his share, towards sale proceeds of the lands sold by him, shall be refunded to him.

(Kshitij R.Vyas,J.)

(M.C.Patel,J.)

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